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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

BUFFALO SAVINGS BANK

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York.

OPINIONS BELOW

The opinion of the Erie County Court entered May 29, 1959 (R. 68–75) is reported at 186 N.Y.S. 2d 960, 17 Misc. 2d 564. The opinion of the Appellate Division entered July 1, 1960 (R. 40–44) is reported at 202 N.Y.S. 2d 70, 11 A.D. 2d 158. The opinion of the Erie County Court on remand, entered on October 18, 1960 (R. 29–39), is reported at 206 N.Y.S. 2d 518, 26 Misc. 2d 443. The opinion of the Appellate Division entered May 18, 1961 (R. 115–120), on the second appeal, is reported at 215 N.Y.S. 2d 189, 13 A.D. 2d 207. The opinion of the New York Court of

Appeals entered February 22, 1962 (Appendix A, *infra*, pp. 14–36), is not officially reported.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on February 22, 1962 (Appendix A, *infra*, pp. 37–39). The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the priority of payment accorded an earlier-arising Federal tax lien by *United States* v. *New Britain*, 347 U.S. 81, may be defeated by a provision of State law that payments to discharge local tax liens shall be "deemed" expenses of a mortgage foreclosure sale.

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix B, *infra*, pp. 40–41: Sections 3670, 3671 and 3672(a)(1) of the Internal Revenue Code of 1939, and Sections 1082 and 1087 of the New York Civil Practice Act.

STATEMENT

In 1946 the Buffalo Savings Bank lent money to Joseph B. Victory, receiving a mortgage on real property to secure its loan. In 1953 the United States filed in the Erie County Clerk's Office notice of a federal tax lien against Victory's property for $857.07. (R. 58–59, 66, 87–88). On and after July 1, 1957, local liens attached to the mortgaged property resulting from defaults in the payment of real estate taxes for 1957 and 1958 owed to the City of Buffalo, real estate taxes for 1958 owed to Erie County, and

sewer rents for 1958 levied by the Buffalo Sewer Authority.[1] (R. 63–64, 82–83). The present action for foreclosure of its mortgage was begun in the Erie County Court on October 21, 1958, by the Buffalo Savings Bank. Besides the mortgage, there were sums due on the lien-secured debts owing to the United States, Erie County, the City of Buffalo, and the Buffalo Sewer Authority. (R. 76–86; App. A, p. 15.)

On June 9, 1959, the county court entered a judgment providing that the mortgaged property should be sold "subject to all local real estate taxes, assessments and water rates" (R. 50), but free and clear of the federal tax liens, and that the proceeds should be used first to satisfy the mortgage debt. Upon appeal by the United States, the Appellate Division on July 1, 1960, reversed the judgment, stating that the sale free of the federal lien but subject to local liens would erroneously give the local liens "a superpriority" although on the basis of the federal rule of "first in time, first in right" the local liens were subordinate to the earlier-arising federal lien (R. 42, 45–46). It directed a sale of the property free and clear of all liens.

Upon remand, the county court, on October 20, 1960, amended its judgment to order a sale free of all liens, the proceeds of which were to be used first to pay all local real estate taxes, assessments, and water rates "as a part of the expenses of the sale," pursuant to Section 1087 of the New York Civil Practice Act (R. 9). On appeal by the United States the Appel-

[1] The mortgagee bank did not advance any sums for payment of these local real property taxes and assessments.

late Division on May 18, 1961, ordered modification of the judgment to apply to the proceeds of such a foreclosure sale "the rule of priorities laid down in United States v. City of New Britain, 347 U.S. 81," (R. 116) under which the local tax and water liens were "inferior to the tax lien of the United States, having accrued subsequent to the time of the filing of the United States tax lien." (R. 111.)[2] This modification was made in the judgment of the Erie County Court entered June 13, 1961. (R. 140–149.)

The mortgagee bank appealed to the New York Court of Appeals from the judgment of the Appellate Division entered May 18, 1961. (R. 105–106.) That court (Judges Fuld and Foster dissenting), although approving of the order directing a sale of the property free and clear of all liens, reversed the Appellate Division's decision as to the distribution of the proceeds and reinstated the County Court judgment of foreclosure of October 20, 1960, authorizing the payment of later-arising local taxes ahead of prior

[2] The Appellate Division directed that the property be sold free and clear of all liens; that the proceeds be deposited in a bank; that from such proceeds the referee pay the fees, costs and disbursements allowed; that out of the net proceeds then remaining, the referee set aside, in a separate bank account in his name, designated as "Priority Adjustment Fund", the sum due upon the mortgage and also a sum sufficient to pay other outstanding liens, if any, superior to the tax lien of the United States; that from the balance, if any, remaining, the referee pay first the tax lien of the United States, and then the local real estate taxes, assessments and water rates; that if there were insufficient moneys available to pay such real estate taxes, assessments and water rates, the balance thereof was to be paid out of the Priority Adjustment Fund. (R. 108–114.)

federal taxes, as expenses of the foreclosure sale. (Appendix A, *infra*, pp. 27, 36.)

REASONS FOR GRANTING THE WRIT

I

The decision of the New York Court of Appeals is squarely in conflict with this Court's decision in *United States* v. *New Britain*, 347 U.S. 81.

The relevant facts of the *New Britain* case were these. A foreclosure sale of the taxpayer's real property produced a fund of $28,071 against which were claims of $31,000 including sale expenses, two mortgages, a recorded judgment, city real-estate-tax liens and water-rent liens, and federal tax liens. The state courts held that the city liens were entitled to payment prior to all other claims except those for expenses of sale, regardless of the date at which they became perfected and attached to the taxpayer's property. This Court held, in an opinion which has furnished the foundation for a long line of later decisions, that § 3670 of the Internal Revenue Code of 1939 (which creates the federal lien) implicitly incorporated the familiar rule of "first in time, first in right" (p. 87) as a matter of federal law to determine the priority of competing local and federal liens. Accordingly, the Court held, any federal tax liens which attached to the taxpayer's property at an earlier date than the local real-estate-tax and water-rent liens were entitled to a prior right to the proceeds of sale of the property.

Although the facts of the present case are "on all fours" with those of *New Britain*, the New York Court of Appeals has failed to follow this Court's

decision. In the instant case a federal tax lien under sections 3670 and 3671 of the Internal Revenue Code of 1939 indisputably attached to all of Joseph Victory's property, including the real property here in issue, *after* the real property had been mortgaged to Buffalo Savings Bank but *before* any of the state tax liens now asserted had arisen. The United States recognizes the priority of the mortgage lien but claims that its tax lien, which arose prior in time to any local lien for taxes or water rates, is prior in right to any such local lien. The New York Court of Appeals afforded priority to the concededly later-arising state tax liens in a decision which wholly fails to distinguish the *New Britain* case.

A. It is clear beyond reasonable dispute that in *New Britain* this Court was faced with and deliberately resolved the very question of circularity of state and federal liens that is alone in issue in this case. See 347 U.S. at 87-88. In *New Britain* state law granted the local tax liens a priority over mortgage liens. Federal law, as there determined by this Court, resulted as to certain federal liens in establishing the following order of priority: (1) mortgage lien; (2) federal tax lien; (3) state tax lien. Both the Connecticut Supreme Court of Errors and this Court agreed that no provision of federal

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As noted above, federal law applies the traditional rule of "first in time, first in right" to determine the relative priorities of perfected state and federal tax liens. The same rule, as modified by the notice requirements of section 3672 of the 1939 Internal Revenue Code and of section 6323 of the 1954 Code applies to determine relative priorities between the federal lien and the rights of certain specific parties (mortgagees, pledgees, purchasers, and judgment creditors).

law prevented the state from giving priority to various state liens (such as tax and water-rent liens) over mortgages and judgments. It therefore was apparent that a mortgagee would enjoy the full benefits of its mortgage only if the federal lien were subordinated to any state lien which the state chose to make prior in right to a mortgage lien. This Court took careful note of this inevitable consequence but nevertheless unequivocally concluded that federal rules alone determine the priority of the federal tax lien and that these rules are unaffected by any burden of subordination the state may choose to impose upon the mortgage lien which the federal statute respects. The Court held that (347 U.S. at 88):

> The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien. There is nothing in the langage of § 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein, and the legislative history lends support to this impression.

In sum, federal law was held to determine the relative priority of a federal tax lien vis-a-vis any and all state liens, regardless of inconsistent state law. State law was left free to determine the relative priorities of non-federal liens among themselves.

B. The facts of the present case are indistinguishable from those of *New Britain*. The distinctions ventured by the New York Court of Appeals are patently frivolous.

(1) First, the New York Court has held that the federal lien reaches only the mortgagor's interest *at the time of foreclosure* while the state liens attach to the mortgagor's interest prior to the time of foreclosure. (App. A, pp. 17, 18, 20, 21, 24, 28.) An alternative statement of the same argument is that the federal lien reaches only the state-defined "surplus" available to the mortgagor at the time of foreclosure while "[t]he local government lien is not a levy against the mortgagor, but against the land * * *" (App. A, pp. 17, 19.) However, the statute itself provides a conclusive answer to this purported distinction. Section 3670 and 3671 of the Internal Revenue Code of 1939 state in the clearest terms that a lien upon all of the taxpayer's real and personal *property*—not that part of his property free of state liens, nor, much less, the unforeseeable surplus from the sale of his property—arises at the time the assessment list is received by the collector. Indeed the entire presupposition of the federal rule of "prior in time, prior in right" is that the federal tax lien attaches to the taxpayer's property at the time the assessment list is received by the collector and not to the surplus after foreclosure. If this were not so, every perfected state lien on a particular piece of property would be prior to any federal tax lien regardless of the date at which the state lien arose.

(2) A closely related argument of the New York Court of Appeals attaches significance to the fact that the state lien, "[a]s a lien for taxes for essential services applied for the benefit of the land", "attached directly to the particular parcel of real property", while the federal lien attaches "because of an unconnected indebtedness of the owner of the land" (App. A, p. 20). This argument too was considered and rejected on identical facts in *United States v. New Britain, supra*, where this Court stated (347 U.S. at 84):

> * * * we accept the holding as to the specificity of the City's liens since they attached to specific pieces of real property for the taxes assessed and water rent due. * * * The federal tax liens are general and, in the sense above indicated, perfected. But the fact that one group of liens is specific and the other general in and of itself is of no significance in these cases involving statutory liens on real estate only. *United States v. City of Greenville*, 118 F. 2d 963, 964. * * *
>
> Thus, the general statutory liens of the United States are as binding as the specific statutory liens of the City. The City gains no priority by the fact that its liens are specific while the United States' liens are general. * * *

(3) Finally, the New York Court of Appeals relies upon the fact that under state law payment of local taxes, assessments, and water rates is termed an expense of a foreclosure sale. However, whatever may be the priority status of the actual costs of disposing of encumbered property, it is clear that a state cannot alter the federal rules of priority of

liens by merely designating a particular type of state lien (which is totally unrelated to the actual costs of sales of encumbered property) as an "expense" of foreclosure. To recognize any such state power to determine priorities by a mere change in terminology is to authorize the state to subordinate earlier-arising federal tax liens to any state-created lien the state chooses to call an expense of foreclosure.

Certainly there is nothing in the opinion of this Court in *United States* v. *Brosnan*, 363 U.S. 237, which affords support for this distinction. *Brosnan* dealt solely with the right of a senior mortgagee to divest the claims of junior lienors (including the United States) under state-authorized procedures, without recourse to a judicial sale. This Court was not asked to consider and did not pass upon the validity or effect of the sheriff's payment of local taxes incident to the sale, for the only contested issue involved the propriety of the state *procedures* for foreclosure. The opinion is replete with reaffirmations of the principle—fundamental to the law of federal tax liens—that a federal rule which is found in Section 3670 determines the relative priorities of State and federal liens when the federal lien has attached to what is incontestably the taxpayer's property. 363 U.S. at 240, 241. The *Brosnan* case adopts state law for the sole purpose of authorizing the use of state procedures for foreclosure.

II.

The present decision of the New York Court of Appeals in conflict with the decisions of the Fourth

Circuit in *United States* v. *Bond*, 279 F. 2d 837, certiorari denied, 364 U.S. 895; the Ninth Circuit in *United States* v. *Christensen*, 269 F. 2d 624; the First Circuit in *United States* v. *Wasserman*, 257 F. 2d 491; the decision of the Supreme Court of Michigan in *Union Central Life Ins. Co.* v. *Peters*, 301 Mich. 283, 105 N.W. 2d 196, reversed on other grounds, *sub nom. United States* v. *Union Central Life Ins. Co.*, 368 U.S. 291; and the decision of the Wisconsin Supreme Court in *First Nat. Bank of Chippewa Falls* v. *Hennaman Co.*, 10 Wis. 2d 260, 103 N.W. 2d 24, certiorari denied, 364 U.S. 836. See also *Southern Ohio Savings Bank & Trust Co.* v. *Bolce*, 165 Ohio St. 201, 125 N.E. 2d 217; and *Stadelman* v. *Hornell Woodworking Corp.*, 172 F. Supp. 156 (W.D.N.Y.).

In each of those cases as in *New Britain*, *supra*, and as in the instant case, an earlier-arising federal tax lien was accorded priority over state tax liens although, under state law, the state tax lien could apparently be satisfied at the expense of a mortgagee whose claim was prior to that of the United States under federal law. Moreover, in each of those cases a specific local tax lien, which related directly to obligations flowing from ownership of the encumbered property, was held, following *New Britain*, to stand on a par with the general federal lien which resulted from a federal tax debt unrelated to the particular land in question. The facts of these cases differ from those of the present case only in that a New York statute provides that all taxes, assessments, and water rates which are paid out of the proceeds of a foreclosure sale shall be "deemed expenses of the sale within

the meaning of that expression as used in any provision of this article." (Civ. Prac. Act, § 1087, App. B, p. 41). That choice of labels—which is, of course, perfectly proper when used for the purpose of determining consequences controlled by state law—cannot be considered as a justification for subordinating an earlier-arising federal lien without overruling the firmly established principle that the priority of a federal tax lien is a question of federal law.

III

The question presented is of great importance to the administration of the internal revenue laws and to the collection of the federal revenue. In the eight months prior to February 28, 1962, the federal government filed 2211 notices of federal tax liens in New York. The effectiveness of those liens and of the far greater number filed in earlier periods and still outstanding is cast in serious doubt by the decision of the New York Court of Appeals.

CONCLUSION

To protect the integrity of this Court's *New Britain* decision, to resolve a conflict between the decision of the highest court of New York and the uniform contrary decisions of three courts of appeals and of two state supreme courts, and to determine the effectiveness of a very large number of federal liens in the State of New York, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1962.

APPENDIX A

BUFFALO SAVINGS BANK, Appellant, *v.* BEVERLY VICTORY, Individually and as Administratrix of the Estate of JOSEPH VICTORY, Deceased, et al., Defendants, and UNITED STATES OF AMERICA, Respondent

Decided February 22, 1962

BURKE, J. The issue here is whether the payment of local real estate taxes and assessments as expenses of sale, rather than the application of that amount toward the payment of a Federal lien filed against the mortgagor prior to the accrual of local taxes, disregards the alleged right of the tax lien of the United States to prior payment.

We find that the Federal tax lien is not entitled to priority over subsequently accrued local tax liens—superior to the mortgage debt—since the respective liens are not comparable charges on real property and the "mortgagee" has an absolute preference over Federal liens.

Plaintiff commenced this action in October, 1958 to foreclose its real property mortgage given by Joseph B. Victory, dated and recorded April 5, 1946. At the time of verification of the complaint there was a balance due on the bond of $1,473.75, with interest at the rate of 5% per annum from January 10, 1958. The United States was *made a party because of a tax lien it filed in the Erie County Clerk's office January 15, 1953 against the mortgagor, since deceased.* Its answer stated a balance due on the lien of $689.07, plus interest. Plaintiff did not advance

any sums for payment of local real property taxes and assessments, which became liens upon the land on and after July 1, 1957.

The mortgagee moved for summary judgment providing that the premises be sold free of the United States tax lien, but *subject* to all real property taxes and assessments. This motion was granted by the Erie County Court. On appeal by the respondent, the Appellate Division reversed and remitted the case to the County Court, stating that the discretionary authority to have the property sold *subject* to all local real estate taxes "may not properly be exercised in a case such as this in which there is a problem of circular priorities" (11 A D 2d 160). Thereafter the County Court once more granted summary judgment in favor of the mortgagee providing that the premises be sold and directing that the Referee "shall, as a part of the expenses of the sale, pay out of the proceeds of said sale all real estate taxes, assessments and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid real estate taxes, assessments or water rates which have not apparently become absolute". The judgment further foreclosed all rights, liens, and equities of redemption in the premises, except as to the one-year period of redemption granted to the United States by section 2410 of title 28 of the United States Code.

On appeal by the United States, the Appellate Division modified the judgment by providing that "the rule of priorities laid down in *United States* v. *New Britain* (347 U.S. 81) applies" (13 A D 2d 208), and that the local tax liens were not to be paid as expenses of the sale.

The appellant mortgagee contends that the fore-

closure procedure of New York is determined by our State law and that a direction to pay local taxes and assessments as expenses of the sale was a proper direction within section 1087 of the New York Civil Practice Act. The United States contends that this court is barred from reaching a determination reversing the Appellate Division and affirming the judgment of Erie County Court. (*United States* v. *New Britain*, 347 U.S. 81.)

Although the United States Supreme Court in recent years has passed on the question of priority of liens and the resulting effect upon mortgagees, their decisions provide no clear command governing us here.

The case of *United States* v. *New Britain* (*supra*) is distinguishable from the present case.

There the Supreme Court assumed, in the posture of the case as it reached that court, that the contest was between the local government and the Federal Government over their respective rights in surplus funds.

In the usual case, as here, however, the state of facts shows that the dispute is really between the mortgagee and creditors of the mortgagor. The debts of the mortgagor obviously can only be satisfied out of such equity in the real property as the mortgagor may have. When the property is sold in foreclosure, the equity of the mortgagor is extinguished except in the event the bid provides a surplus. Any interest of the mortgagor is fully protected. The mortgagor can bid at the sale, bring surplus money proceedings and resist a deficiency judgment by adducing proof that the value of the property exceeded the bids. In New York State the local government is not paid out of the surplus as the mortgage is subject to its liens, but the Federal Government as a creditor of the mort-

gagor can look only to the surplus for the satisfaction of its lien. The local government lien is not a levy against the mortgagor, but against the land and must be paid together with other costs from whatever funds the sale of the land produces before (if there were no creditors of the mortgagor) any claimed interest of the mortgagor could be asserted. Our State law has not characterized the nature and extent of the Federal tax lien, but has determined the nature and extent of the property interests of the taxpayer (admittedly a State function), which in the case of real property is conditioned upon the payment of annually recurring governmental land taxes, the payment of which may not be avoided by a foreclosure sale. Of course, the Federal Government's claim, which is based on the claimed interest of the mortgagor, can have no better standing, that is, the Federal lien is also to be paid when there is a surplus in which the mortgagor would have an interest. It would manifestly be unjust to require a mortgagee to pay a creditor of a mortgagor when it appears that the mortgagor had no equity in the real property.

In the *New Britain* suit (*supra*) the court, at the outset, held that the contestants were vying over rights to funds which were considered as surplus. Federal liens securing unpaid withholding and unemployment taxes and insurance contributions owed by the mortgagor attached to his interest in the property subsequent to two mortgages and a judgment lien, but prior to city liens for unpaid real estate and water taxes. Connecticut law provided that the statutory liens for real estate taxes and water rent took precedence over all other liens or incumbrances. Mr. Justice MINTON, speaking for the court, conceding that the mortgagee had a preference, stated

at pages 85–86: "It does not follow, however, that the City's liens must receive priority as a whole. We believe that priority on these statutory liens is determined by another principle of law, namely, 'the first in time is the first in right.' * * * We think that Congress had this cardinal rule in mind when it enacted § 3670, a schedule of priority not being set forth therein. Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate."

Although it may have been the clear intent of Congress that this Federal tax lien have a priority determined by the timeliness with which it attached to the interest of the mortgagor in the real property, *New Britain* does not indicate that it was the intent of Congress to upset established State procedures in foreclosure actions or curtail the absolute preference granted to mortgagees. The statement (p. 88) that "The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors" is far too removed, in the light of the real issue here, from the court's interpretation of congressional intent to have any relation thereto.

Not to be lost sight of in its discussion of the relative priority of the liens is the court's statement that Congress intended to assert the Federal lien "as to any funds *in excess of the amount* necessary to pay the mortgage and judgment creditors." (*United States* v. *New Britain*, 347 U.S. 81, 88, *supra;* italics supplied.) The Supreme Court there recognized that the mortgagor's interest in the proceeds of the foreclosure sale, and consequently the United States lien, reaches only surplus moneys.

But such surplus funds cannot be created by the judgment, for they are the moneys paid for the land in excess of the amount decreed in the judgment. A judgment which omits an item of sale expense in order to create a surplus fund to which subsequent liens can attach violates the statute. Rights of lienors in surplus funds are to be protected, but the law of this State cannot be subverted to create a surplus where none might otherwise exist. Our State law does not prevent such lienors from bidding at a foreclosure sale in order to protect their liens; but, inasmuch as they are not forced to bid a sum which will create a surplus, it would be inequitable to force the foreclosing mortgagee to bid an inflated price creating a surplus through the scheme of "circular priorities".

In this case the respondent's claim that its lien, founded on the interest of the defaulting mortgagor in the real property, should be granted a priority over the lien on the land, concededly superior to not only the mortgagor's interests in the realty but the mortgagee's interest as well, depends on the obviously fallacious contention that the lien of the municipality upon the land is akin to the lien of the Federal Government as a creditor of the mortgagor. The plain answer is that the Federal Government is only the creditor of a debtor whose interest in the land is subordinate to the local government lien, which need not be reduced to judgment nor perfected by a filing in the County Clerk's office. As a lien for taxes for essential services supplied for the benefit of the land, it attached directly to the particular parcel of real property. The Federal lien was filed in the Clerk's office against a presumed equity in

the real property held by the mortgagor. This respondent imagines a surplus, which is as yet non-existent, against which it would press a lien arising from a debt owed to it by the mortgagor. But in a foreclosure suit the equity of the mortgagor upon which a Federal lien depends should be established according to law, not by an ipse dixit.

The real estate tax and water-rent liens are not liens which attach to the property merely because of an unconnected indebtedness of the owner of the land, as are Federal tax liens. The property itself, in its very nature as land, incurs the indebtedness. It matters not who owns the land for, even if the United States in foreclosing its lien had a Receiver appointed to sell the land, the property could not have been transferred free and clear of the local tax liens attaching while the United States was in possession (see *Borock v. City of New York*, 268 F. 2d 412).

Thus, the circumstances in the present case are quite different from those assumed in *United States* v. *New Britain* (*supra*). The question is not "the relative priority of statutory federal and municipal liens to the proceeds of a mortgage foreclosure sale of the property to which the liens attached" (*United States* v. *New Britain*, *supra*, p. 82), but whether the payment of the Federal lien filed against the mortgagor should be mandated where there is no evidence that the mortgagor has a financial interest at the time of foreclosure. Here we are faced with the true parties in interest—the mortgagee and the Federal Government. Under New York law no funds are deemed surplus until the expenses of the sale, the costs of the action and the amount of the foreclosed mortgage debt plus interest have been fully paid. (Civ. Prac. Act,

§ 1082). The procedure in this State requires the officer conducting the foreclosure sale to pay out of the proceeds all taxes, assessments and water rates which are liens on the property, unless the judgment directs otherwise. These payments are expenses of the sale by statute. Therefore, the question of what, if any, financial interest the mortgagor-taxpayer had on which the Federal Government had a lien can only be determined under the State law after the foreclosure sale.

The procedure adopted by the Appellate Division does not follow New York State procedure. Up to the present time the expenses of sale have always been determined by State, rather than Federal, law, and even the judgment in *New Britain (Brown v. General Laundry Serv.*, 19 Conn. Supp. 335) recognized that the expenses of sale have priority over any other claim to the moneys realized on the sale. Certainly precedent demands that we should reaffirm the principle that State procedures govern.

Moreover, the Supreme Court in a recent decision has allowed State law to control the procedure of foreclosure and payment of liens. In *United States* v.

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[1] (Civ. Prac. Act, § 1087)—"Where a judgment rendered in an action to foreclose a mortgage upon real property directs a sale of the real property, the officer making the sale must pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments and water rates which are liens upon the property sold and redeem the property sold from any sales for unpaid taxes, assessments or water rates, which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale within the meaning of that expression as used in any provision of this article. The provisions of this section shall not apply to any judgment in an action wherein any municipal corporation of this state is the plaintiff and the purchaser at the foreclosure sale thereunder."

Brosnan (264 F. 2d 762, affd. 363 U.S. 237) Federal tax liens attached to property subject to a purchase-money mortgage, but prior to local tax liens.[2] Upon default in payment of the mortgage, the mortgagee caused a confession of judgment to be entered on the bond. A writ of *fieri facias* for the sale of the property issued to the Sheriff. The United States was not a party to this action. "The sheriff held the sale of the property on January 3, 1956; it was bid in by Brosnan and Jacob [assignees of the mortgagee] for $6,203 and, it is presumed, the discharge of the mortgage indebtedness. *The amount of the bid went to satisfy* costs of the sale, and for various outstanding local taxes." (264 F. 2d 764; emphasis supplied.)

More than a year later the United States brought an action to enforce its lien, but the District Court (164 F. Supp. 357) and the Court of Appeals for the 3d Circuit (264 F. 2d 762, *supra*) held that the junior lien of the Government was extinguished even though the United States had not been joined as a party. The Supreme Court affirmed the determinations below (363 U.S. 237). The opinion was replete with references to State law and procedure—something not found in *New Britain*.

The Supreme Court's attention was drawn to the fact that Pennsylvania gave its own tax liens more favorable treatment than it rendered the Federal liens at pages 25 to 27 of the United States' brief: "Indeed, Pennsylvania law itself treats state tax liens more favorably than federal tax liens. A Pennsylvania

[2] The Federal liens, amounting to $40,303.34, attached to the property between April 11, 1949 and November 28, 1951 (Exhibit B to complaint of United States). The local taxes paid out of the proceeds of the sale were county, township and school taxes for the period 1952–1955 in the amount of $5,756.90 (Transcript of Record, p. 22).

statute provides that 'The lien of all taxes * * * against any real estate within this Commonwealth shall be divested by any judicial sale of such land: Provided, The amount of the purchase money shall equal the amount of the said taxes'. (Purdon's Penna Statutes Annotated, Title 53, Section 7104, Appendix, *infra*, p. 36). While Pennsylvania law permits discharge of a junior lien on realty through foreclosure of a prior mortgage at a sheriff's sale, the Commonwealth's liens may be divested only to the extent permitted by statute [cases cited]. Thus, under Pennsylvania law the state's tax lien will be discharged through foreclosure only if the state's tax claim is paid in full out of the proceedings. The decision below holds, however, that the same foreclosure proceeding wipes out the federal lien even though the United States receives not a single penny toward payment of its claim."

The dissent makes it clear that the objection to Pennsylvania procedure in extinguishing the lien of the Federal Government was not that it was done according to State procedure, but that Pennsylvania procedure did not provide for notice to junior lienors (363 U.S. 261).

Although the main facet of the *Brosnan* case was a sanction of Pennsylvania's procedure, whereby the United States was not required to be a party to the action in order to extinguish its lien, the affirmance also necessarily sanctioned that State's procedure of paying local taxes out of the proceeds of the sale without the necessity of creating a surplus with which to pay liens prior to the local tax liens. (Purdon's Pennsylvania Statutes Ann., tit. 53, §§ 7103–7105.) This is a departure from the holding in the *New Britain* case, as that case is construed by the respondents. The Supreme Court in *Brosnan* also gave

effect to the preference accorded to mortgagees by State and Federal law, and the decision tends toward the principle stated in the dissenting opinion of HAYNSWORTH, J., in *United States* v. *Bond* (279 F. 2d 837, 848, cert. den. 364 U.S. 895).

According to respondent's reasoning, the mortgagee, concededly not under any obligation to pay the Federal lien on the interest of the mortgagor at the time the lien was filed, becomes obligated when it bids in at the foreclosure sale simply because the mortgagee as bidder under State law must bear the cost of unpaid local taxes on the land falling due subsequent to the filing of the Federal lien. This imposition of liability is justified on the assumption that at the time of foreclosure the undetermined financial interest of the mortgagor has a value at least equal to the amount of the unpaid taxes which fell due subsequent to the filing of the Federal lien.

The circumstances present in the case of the foreclosure of a real estate tax lien by a municipality illustrate best the paradoxical result of the application of the rule respondent asserts. Under that rule the municipality which is foreclosing the tax lien for local taxes, which accrued subsequent to the filing of a tax lien filed against the equity of the property owner, shall be obligated to discharge the Federal tax lien in order to secure a clear title. But the interest of such a property owner obviously is worthless, since neither the property owner nor the public would bid on the tax lien which the municipality ultimately had to foreclose. In spite of this evidence of lack of value, the respondent would contend that the Federal lien has a priority because the nonexistent financial interest of the property owner cannot be diminished by giving priority to local taxes accrued subsequent to the filing of the Federal lien and

that, therefore, the municipality must satisfy the Federal lien. In other words, the financial interest of the property owner which was nil develops value through the default of the property owner on local taxes. This *nonsequitur* had to be resorted to because respondent realizes its lien is not a lien on the land, but is only a lien on the equity of the owner. Therefore, it had to invent an equity which the owner could be said to possess at the time of the foreclosure in order to avoid the controlling State law which provides that the nature and extent of the property interests of a defaulting mortgagor can only be determined after a foreclosure sale conducted according to the State laws. The patent infirmity of this contrivance explains why the respondent has improperly invoked a canon in a matter involving disparate liens, which is relevant only to the relationships of kindred liens, i.e., "the first in time is the first in right".

Such a rule, if accepted now, would adversely affect the credit rating of all municipal bonds which are marketed on the assumption that local taxes are a first lien on the land within the municipality. It would also impair the borrowing power of municipalities because it makes the municipality liable for the personal debts a tax delinquent property owner owes to the Federal Government. Finally, it would cloud the title of properties which the municipalities have resold after acquisition through tax lien foreclosures.

The logic of the respondent appears to be as circular as the type of priority that it would have this court stamp with approval. The procedure that it proposes is novel to this State. Were local taxes not owing upon the land, the United States could not, through its own admissions, compel the creation of

a surplus in which its lien would share with the judgment creditors. Is it logical that the Federal Government should be entitled to compel the mortgagee to treat the amount of real estate taxes subsequently accruing as a surplus to be applied toward payment of the Federal lien?

To accede to this attempt to foist the personal debts of the mortgagor owing to the United States on the mortgagee is to agree to the imposition of an indirect tax on savings banks who have invested billions of dollars in mortgages and on the savings of our citizens invested in mortgages which have been accorded a preference even under Federal law (U.S. Code, tit. 26, § 6323, subd. [a]). If the preference is to be whittled down, it should be done explicitly by a statute enacted by the representatives of the States in the national Congress and not by the courts.

The direction in the resettled judgment of foreclosure that the Referee should pay the real estate taxes, assessments and water rates out of the proceeds of the sale as expenses of the sale is not only in conformity with State law (Civ. Prac. Act, § 1087), but is also in keeping with the preference conferred on the mortgagee by State and Federal law protecting "all those rights which the Congress must have known the mortgagee commonly and usually possesses" (*United States* v. *Bond*, 279 F. 2d 837, 851, *supra*). Being the proper procedure of this State, the resettled judgment of foreclosure of October 20, 1960, should be affirmed.

The judgment of the Appellate Division entered June 13, 1961, should be reversed and the judgment of the County Court, Erie County, entered October 20, 1960, reinstated without costs.

FULD, J. (dissenting). By its present decision, the

court is holding that a Federal tax lien filed against a mortgagor prior to the accrual of local real estate taxes and assessments—which are superior to the mortgage debt—is not entitled to priority over those subsequently accrued local liens. I cannot agree. In my view, the conclusion reached by the majority is opposed by controlling authority. (See *United States* v. *New Britain*, 347 U.S. 81; see, also, *United States* v. *Bond*, 279 F. 2d 837 [4th Cir.]; *United States* v. *Christensen*, 269 F. 2d 624 [9th Cir.]; *Stadelman* v. *Hornell Woodworking Corp.*, 172 F. Supp. 156 [U.S. Dist. Ct., W.D.N.Y.]; *United States* v. *Lord*, 155 F. Supp. 105 [U.S. Dist. Ct., N.H.]; *Union Central Life Ins. Co.* v. *Peters*, 361 Mich. 283.) Nor may the impact of such authority be avoided by having the State, through legislative enactment or court decision, label local taxes and assessments "expenses of the sale", that is, of the mortgage foreclosure sale following the action brought by the mortgagee (Civ. Prac. Act. § 1087).

Once it has been determined, under State law, that the taxpayer has property or rights to property, "state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States." (*United States* v. *Bess*, 357 U.S. 51, 57.) Moreover, when a Federal tax lien has attached to property of the taxpayer, as undoubtedly it has here, State law may not destroy it. (See *Commissioner* v. *Stern*, 357 U.S. 39.) As already indicated, calling the local taxes "expenses of the sale" does not help the local taxing authority, for it is to substance, not form, that the courts look. Local taxes do not result from the mortgage foreclosure sale; on the contrary, they are pre-existent to the sale. Accordingly, the State's characterization of them as "expenses of

the sale"—appropriate though it may be for the State's own purposes—is thoroughly unreal in our present context and completely ineffectual to affect the priority of the Federal lien. (Cf. *United States v. Gilbert Associates*, 345 U.S. 361.)

In deciding questions concerning the relevant priorities of a Federal tax lien and other liens, it is perfectly clear that State law determines the nature and extent of the property interests of the taxpayer and that Federal law determines the priority of the competing claims themselves. (*See, e.g., Aquilino v. United States*, 363 U.S. 509, 515-516; *United States v. Brosnan*, 363 U.S. 237, 240; *United States v. Bess*, 357 U.S. 51, 55, *supra*; *United States v. Acri*, 348 U.S. 211, 213.) Although the court's opinion herein does not expressly reject this proposition—as to the proper role of State and Federal law in this area—its decision stands squarely opposed to it. What the court has done, under State law, is to characterize the nature and extent of the Federal lien and determine its priority in competition with local liens—a function exclusively reserved to the Federal law. (*See Aquilino v. United States*, 363 U.S. 509, *supra*.) Thus, the majority describes the Government's status in the present action as that merely of "a creditor of the mortgagor" and concludes that, since the Government's position "is based on the claimed interest of the mortgagor, [it] can have no better standing [than the mortgagor], that is, the Federal lien is also to be paid when there is a surplus [over mortgage debt plus local taxes] in which the mortgagor would have an interest" (opinion, p. 37). To employ the language of the opinion in the *Brosnan* case, this is not an authorized State determination of the " 'property and rights to property' * * * to which a govern-

ment tax lien attaches," but rather an unauthorized State determination of "matters directly affecting the nature or operation of [federal tax] liens" (363 U.S. 237, 240).

Furthermore, giving priority to the after-accrued local taxes, as the majority is here doing, is directly contrary to the Supreme Court's decision in *United States* v. *New Britain* (347 U.S. 81, *supra*). In that case, in addition to prior mortgages and a prior judgment lien, the taxpayer's property was incumbered by a Federal tax lien and, subsequent in time to such lien, by a municipal tax lien. The Connecticut Supreme Court reasoned, as the majority does here, that, since Federal law subordinated the Federal tax lien to mortgage and judgment liens and since, under State law, these mortgage liens were subordinated to real property tax liens, the Federal tax lien had to be subordinated to the local real property tax lien. (See *Brown* v. *General Laundry Serv.*, 139 Conn. 363, 373.) In answer to this argument, the Supreme Court of the United States declared (347 U.S., at p. 88):

> "We do not agree. The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgagee and judgment creditors, Congress intended to assert the federal lien."

Even more recently, in *United States* v. *Brosnan* (363 U.S. 237, *supra*), the Supreme Court, citing numerous decisions, "rejected" the very position taken by the majority in this case (363 U.S., at p. 241):

> "This Court has repeatedly rejected the contention that because a fee owned by a taxpayer was already encumbered by a lien which en-

joyed seniority under state law, the Government's lien necessarily attached subject to that lien."

The rule adopted in the *New Britain* case as the Federal rule for resolving conflicts between a Federal tax lien and local real property tax liens is the olden one that " 'the first in time is the first in right' " (347 U.S., at p. 85). As there pointed out, "When the debtor is insolvent, Congress has expressly given priority to the payment of indebtedness owing the United States, whether secured by liens or otherwise, by § 3466 of the Revised Statutes, 31 U.S.C. (1946 ed.) § 191. In that circumstance, where all the property of the debtor is involved, Congress has protected the federal revenues by imposing an absolute priority". Where, however, the court continued (p. 85), "the debtor is not insolvent, Congress has failed to expressly provide for federal priority, with certain exceptions not relevant here". (And see Internal Revenue Code of 1939, U.S. Code, tit. 26, § 3672; Internal Revenue Code of 1954, U.S. Code, tit. 26, § 6323). And, added the court, "There is nothing in the language of § 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein" (p. 88), that is, mortgagees, judgment creditors, pledgees and purchasers. Accordingly, the relative priority of each lien here involved "must depend upon the time [each of them] attached to the property in question and became choate" (p. 86. See, also, *United States* v. *Bond*, 279 F. 2d 837, *supra*; *United States* v. *Christenson*, 269 F. 2d 624, *supra*).

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[1] It is appropriate to note at this point that the record before us, like the record in *New Britain* (347 U.S., at p. 85), does not indicate that the mortgagor-taxpayer was insolvent.

The court seeks to distinguish *New Britain* from the present case on the ground that the contest there "was between the local government and the Federal government over their respective rights in surplus funds", whereas here the "facts [show] that the dispute is really between the mortgagee and creditors of the mortgagor" (opinion, p. 36). Starting from this premise, the majority urges that, if the contest were between the Federal Government and the local taxing authorities, *New Britain* would control and the Government would prevail. But, since the dispute here is between the United States, as a creditor of the mortgagor, and the mortgagee, the latter must prevail, because (the argument proceeds) the Government can have no better standing than the mortgagor himself. And the court seeks to bolster this conclusion by claiming that "the respective liens [in this case] are not comparable charges on real property" (p. 35). In my judgment, the proffered ground for distinction is not tenable.

It is true that in *New Britain* the contest was between the city and the Federal Government but, as the facts disclosed and later developments made clear (see *Brown* v. *General Laundry Serv.*, 19 Conn. Supp. 335), the real parties in interest were the Federal Government and private lienors of the debtor's real estate who were entitled to priority over the Federal lien by the express terms of the Federal lien statutes. The State of Connecticut received its taxes in full at the expense of lienors whose liens were prior to those of the Federal Government. The fact that the contest in *New Britain* was between the city and the Federal Government and in this case between the mortgagee and the Government neither compels nor justifies a difference in result.

As I have already noted, it is the majority's assertion that the lien for local taxes must take precedence over the Government's lien because the respective liens are not comparable charges on real property. This is its position (pp. 36–38): on the one hand, "The local government lien is not a levy against the mortgagor, but against the land." On the other hand, the Federal Government's status is only that of "a creditor of the mortgagor", its claim merely one "based on the claimed interest of the mortgagor". And its lien, rather than being a lien which "attach[es] directly to the particular parcel of real property", as does that of the local government, "attach[es] to the property merely because of an unconnected indebtedness of the owner of the land". In other words, the Federal lien is not against the land, but "against a presumed equity in the real property held by the mortgagor."

Having made these distinctions, the court goes on to suggest that the difference in the way these liens arise assures priority to the liens of the local taxing authorities over the lien of the Federal Government. From this and the status ascribed to the Federal lien, it is the court's conclusion that "the Federal government's claim, which is based on the claimed interest of the mortgagor, can have no better standing [than the mortgagor's claim], that is, the Federal lien is also to be paid when there is a surplus [above the mortgage debt and expenses of sale, including local taxes] in which the mortgagor would have an interest" (opinion, p. 37).

The fallacy of this argument, I venture, is that it mistakes the Federal law with respect to the status and incidence of the Federal interest. The Federal Government is no mere unsecured creditor of a delinquent taxpayer. It is, rather, the holder of "a

lien * * * upon all property or rights to property, whether real or personal, belonging to such person" (Internal Revenue Code of 1954, U.S. Code, tit. 26, § 6321). Such a lien attaches to the real property owned by the taxpayer at the time the "[tax] assessment is made" (U.S. Code, tit. 26, § 6322), not to whatever equity he may have in it after a subsequent mortgage sale. In short, the Federal lien is not, as the majority insists, "against a presumed equity in the real property held by the mortgagor", but against the land itself. The rights of the Federal Government to the proceeds of the mortgage sale are not, therefore, limited to those of the mortgagor.

Let me state the matter somewhat differently. The lien of the United States arose when the assessments were made, and it attached to the mortgaged property at that time. Consequently, if the sale of the property had then been held, that lien could have been satisfied out of the proceeds of such sale after payment of proper expenses and of the amount then due on the mortgage plus interest to the date of payment. The local taxes here involved had not yet come into being and might never have become liens against the property. They might have been paid by the mortgagor or the property might have been foreclosed before they became due. Since, therefore, the liens of the local authorities had at best only a potential existence, we do not reach the question whether those liens were choate when the Federal liens attached. It comports neither with reality nor with law to give such "potential liens" priority over the pre-existing matured Federal lien by labeling them "expenses of the sale" in foreclosure proceedings.

Indeed, an argument very similar to that made by the court here, namely, that the respective charges of the Federal Government and the local taxing authorities are "not comparable charges on real property", was expressly made and rejected in the *New Britain* case (347 U.S. 81, *supra*). It had evidently been argued that the local tax liens should take precedence over the Federal tax lien because they were "specific" while the Federal lien was "general". With respect to this contention, the Supreme Court declared (p. 84):

> "[T]he fact that one group of liens [the local] is specific and the other [the federal] general in and of itself is of no significance in these cases * * *. Thus, the general statutory liens of the United States are as binding as the specific statutory liens of the City. The City gains no priority by the fact that its liens are specific while the United States' liens are general."

Finally, a word must be said about the majority's characterization of the decision in *United States* v. *Brosnan* (363 U.S. 237, *supra*) as "a departure" from the holding in the *New Britain* case. In the first place, *Brosnan* was concerned with a question whether a Federal tax lien could be extinguished under a State procedure for foreclosure in which the Federal Government, *a junior lienor*, was not, and need not have been, a party: what was involved, therefore, was not the problem of priority at issue here. In the second place, although local taxes had been paid out of the proceeds of the mortgage sale and thus had, in effect, achieved priority, that issue was never raised on appeal, the sole issue being—to cull from the court's opinion— "whether the federal lien was effectively extinguished by state

proceedings to which the United States was not, nor was required under state law to be, a party" (363 U.S., at pp. 238–239). The third and (to me) conclusive reason why *Brosnan* may not be taken to be a departure from the *New Britain* holding is that in *Brosnan* the Supreme Court actually cited *New Britain* with approval (363 U.S., at p. 241, n. 4) and restated one of the principles which it had announced; thus, it wrote in *Brosnan* (p. 241): "This Court has repeatedly rejected the contention that because a fee owned by a taxpayer was already encumbered by a lien which enjoys seniority under state law, the Government's lien necessarily attached subject to that lien". As is evident, far from supporting the majority view in the present case, the opinion in *Brosnan* stands with *New Britain* to refute it.

In sum, then, in situations of this kind, the lien of the Federal Government must be recognized as prior in right to that of the local taxing authorities. This follows from the fact that it is prior in time. But this does not mean that those local taxing authorities will not collect their taxes. The majority opinion has placed the contest in its proper setting. The dispute is between the mortgagee and the Federal Government as a creditor of the mortgagor. The local taxing authorities will be paid at the expense of the mortgagee so there will be no adverse economic impact upon the taxing authorities. The mortgagee's interest in the proceeds of the mortgage sale may, perhaps, be diminished. But the mortgagee is not left without recourse where the mortgagor is liable for payment of the debt secured by the mortgage and he is not insolvent. In such a case, the mortgagee may collect the "residue" or balance due from the mortgagor by

way of a deficiency judgment (Civ. Prac. Act, §§ 1082, 1083).

I would affirm the judgment of the Appellate Division.

Chief Judge DESMOND and Judges DYE, FROESSEL and VAN VOORHIS concur with Judge BURKE; Judge FULD dissents in an opinion in which Judge FOSTER concurs.

Judgment of Appellate Division, entered June 13, 1961, reversed and judgment of the County Court, Erie County, entered October 20, 1960, reinstated, without costs.

Court of Appeals

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 22nd day of February in the year of our Lord one thousand nine hundred and sixty-two; before the Judges of said Court.

WITNESS, The HON. CHARLES S. DESMOND, Chief Judge, *Presiding*. RAYMOND J. CANNON, *Clerk*.

REMITTITUR, February 22, 1962.

BUFFALO SAVINGS BANK, APPELLANT

vs.

BEVERLA VICTORY, INDIVIDUALLY &C., & ORS., &C., DEFENDANTS

UNITED STATES OF AMERICA, RESPONDENT

Be it remembered, That on the 27th day of September in the year of our Lord one thousand nine hundred and sixty-one, Buffalo Savings Bank, the appellant—in this cause, came here unto the Court of Appeals, by Little & Burt, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And United States of America, the respondent—in said cause, afterwards appeared in said Court of Appeals by Neil R. Fammelo, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. John H. Little, of counsel for the appellant, and by Mr. C. Donald O'Connor, of counsel for the respondent, briefs filed by amici curiae and after due deliberation had thereon, did, order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein entered June 13, 1961, be and the same hereby is reversed and the judgment of the County Court, Erie County, entered October 20, 1960, reinstated, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Erie County, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Erie County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, February 22, 1962.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein; attached thereto.

RAYMOND J. CANNON,
Clerk.

APPENDIX B

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C., 1952 ed., Sec. 3671.)

SEC. 3672 [as amended by Sec. 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by

law authorized the filing of such notice in an office with the State or Territory; or

* * * * * *

(26 U.S.C., 1952 ed., Sec. 3672(a).)

New York Civil Practice Act:

SEC. 1082. *Final judgment; surplus moneys.*

1. In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action except as provided in subdivision two of this section. All surplus moneys arising from the sale of mortgaged premises under any judgment shall be deposited by the officer appointed to conduct the sale of the premises within five days after the same shall be received and be ascertainable to the credit of the action in a bank or trust company named by the court in the final judgment unless otherwise specially directed, subject to the further order of the court; and every judgment in foreclosure shall contain such directions, except where other provisions are made specially by the court. * * *.

SEC. 1087. *Payment of taxes, assessments and water rates out of proceeds of sale.*

Where a judgment rendered in an action to foreclose a mortgage upon real property directs a sale of the real property, the officer making the sale must pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale within the meaning of that expression as used in any provision of this article. * * *.

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